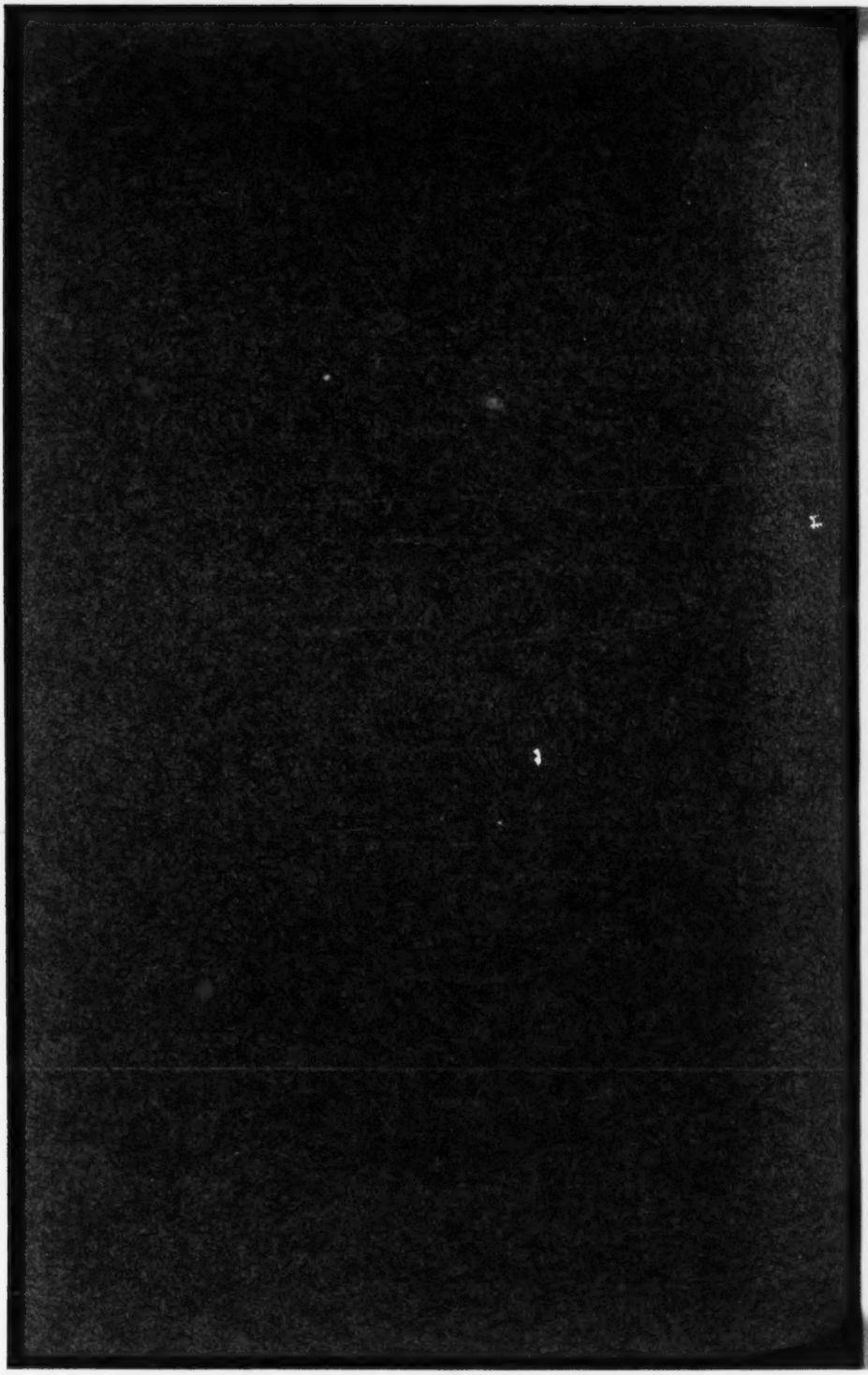
No. 739



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 739

WILLIAM H. KILLOREN, TRUSTEE IN BANKRUPTCY OF HAMILTON-BROWN SHOE COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the referee in bankruptcy (R. 105–117) is not officially reported. The decision of the District Court (R. 129–130) was rendered without opinion. The opinion of the Circuit Court of Appeals (R. 161–171) is reported in 122 F. (2d) 609.

JURISDICTION

The judgment of the court below was entered on September 6, 1941 (R. 172). Petitions for rehear-

ing filed by petitioner and the Board, respectively, were denied on October 11, 1941 (R. 203). The petition for a writ of certiorari was filed on November 12, 1941. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may file proof in bankruptcy of a claim for sums due under a back pay order issued by the Board and enforced by a circuit court of appeals under the National Labor Relations Act.[1]

2. Whether the claim, if thus provable, is entitled to a priority under Section 64 (a) (2) of the Bankruptcy Act.[2]

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Bankruptcy Act are set out in the appendix.

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[1] We discuss *infra* (p. 6, n. 5), the petitioner's failure to mention the entry of the enforcement decree in its statement of the questions presented.

[2] Petitioner includes among its questions presented the question whether the claim, if provable, is entitled to a priority under Section 64 (a) (2) or a governmental priority under Section 64 (a) (5) (Pet. 4). The Board urged entitlement to priority under the latter section (R. 6) but the court below held that only a wage priority was permissible. In these circumstances, petitioner cannot properly raise the question whether a Section 64 (a) (5) priority is proper.

STATEMENT

In a proceeding under Section 10 of the National Labor Relations Act involving alleged unfair labor practices committed by Hamilton-Brown Shoe Company, the Board, on November 23, 1938, issued its findings of fact, conclusions of law, and order (R. 19–33). The Board found that the Company had engaged in certain unfair labor practices; its order, among other provisions, directed the Company to reinstate or place upon a preferential list certain employees found to have been discriminatorily discharged, and to make whole their losses by paying to each of them a sum equal to what each, but for the discrimination, would normally have earned from the date of discharge to the date of reinstatement or placement upon a preferential list, less actual earnings elsewhere (R. 29–33). On petition for review under Section 10 (f) of the Act, the court below entered its decree on May 29, 1939, enforcing the reinstatement and back pay provisions (R. 47–49).

On April 17, 1939, while the petition for review was pending in the lower court, the Company filed in the District Court a petition for corporate reorganization pursuant to Chapter X of the Bankruptcy Act (R. 107). On June 22, 1939, after the entry of the enforcement decree, the Company was adjudicated a bankrupt (R. 107). On October 9, 1939, the Board filed in the District Court a proof of claim for back pay due accumulated under the

Board's order, aggregating $161,160.17 (R. 4–53). The Board alleged that the claim for back pay was provable as a debt owing to the Board (R. 5), and that the claim was entitled to priority under Section 64 (a) (5) of the Bankruptcy Act as a debt owing to the United States (R. 6). On motion of petitioner (R. 55–59), the referee in bankruptcy rendered a memorandum opinion (R. 105–117) and entered an order (R. 119) expunging the Board's claim. Upon the Board's petition to review (R. 120–126), the District Court affirmed the referee's order (R. 129–131).

On appeal by the Board, the court below handed down its opinion, with one judge dissenting (R. 161–171), and entered its judgment (R. 172) reversing the order of the District Court and remanding the cause for proceedings in accordance with its opinion. In substance, the court below held that the obligation of back pay was a provable debt; that the Board had authority to file a claim in respect thereof; and that the claim was entitled to a "wage" priority under Section 64 (a) (2) of the Bankruptcy Act. The Board filed a petition for rehearing limited to the priority question (R. 173–181); petitioner sought a rehearing of the entire case (R. 183–201). Both petitions were denied (R. 203).

ARGUMENT

Petitioner contends that the instant case raises important federal questions not settled by this Court and that the decision below is in probable

conflict with applicable decisions of this Court (Pet. 4, 12).

1. The questions here presented are of first impression. They are not, however, of current importance in the administration of the National Labor Relations Act or the Bankruptcy Act. In no other case has the Board filed, and rarely has it had occasion even to consider filing, a claim in bankruptcy in respect of a back pay order. *A fortiori,* there has been no similar litigation and there are no other relevant decisions of the circuit courts of appeals. Whether the questions raised will in the future recur so as to become important in the administration of the National Labor Relations Act or the Bankruptcy Act is a matter only for speculation.

2. The argument in support of the claim that the decision below is in probable conflict with the applicable decisions of this Court construing the National Labor Relations Act (Pet. 10, 11–12, 14, 15) is that the Act protects only public rights, whereas the rights given effect by the decision below are private since back pay is ultimately distributable to employees. But in holding that back pay is "an obligation or indebtedness of a public character," the court below expressly gave effect to the decisions of this Court that orders of the Board vindicate public, not private, rights (R. 168, 164–165).[3] The

[3] There is no merit in petitioner's argument (Pet. 14–15) that the wage priority accorded the back-pay obligation is inconsistent with the public character of that obligation. Making the employees whole for "losses suffered on account

claim of conflict is thus based on a misconstruction of the decision of the court below, which, in fact, properly applied the very decisions of this Court upon which petitioner relies.[4]

3. We submit that the decision below, in the respects open to attack by petitioner,[5] is correct. It

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of unfair labor practices is a part of the vindication of the public policy which the Act enforces." *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 197; R. 163. For comparable reasons, a jury trial is not necessary. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 48.

[4] Petitioner's further claim (Pet. 15–16) that the decision below casts doubt upon the constitutionality of the National Labor Relations Act is predicated upon the assertion that the decision operates to amend the Bankruptcy Act and the National Labor Relations Act. This assertion begs all questions presented.

[5] Petitioner does not state as a question presented its argument (Pet. 13) that, assuming that back pay becomes provable when a Board order is enforced, the obligation does not in any event arise until the enforcement decree is entered, and hence the claim was not in existence in this case when the bankruptcy petition was filed. Petitioner made no such assertion in its motion to expunge (R. 55–59, see R. 59–105) in the District Court, nor did it do so in the court below, as is evident from the court's opening statement of the questions and its repeated reference thereafter to the entry of the enforcement decree (R. 161, 163, 164).

Were the question presented, it would be a sufficient answer that the back pay liability springs essentially from the order of the Board under the Act, and that a liability having such a statutory source is provable under Section 63 (a) (4) of the Bankruptcy Act, as the court below noted (R. 164). The effect of an enforcement decree is, therefore, to determine issues of validity, as does a judgment rendered after filing of a bankruptcy petition upon a debt otherwise provable, as provided for in Section 63 (a) (5).

seems clear that a back pay obligation enforced by court decree is analogous to, and no less definite or ascertainable than, the variety of liabilities provable in bankruptcy.[6] That the Board has standing to file proof of claim therefor, follows as an incident of its exclusive power to sue for compliance with its orders under the enforcement framework of the National Labor Relations Act. And the purpose of a back pay award to put the employee in the wage position he would have occupied but for the unfair labor practices supports the propriety of the wage priority at least.

CONCLUSION

The decision below is correct. It raises no questions of general current importance and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Associate General Counsel,

A. NORMAN SOMERS,
Attorney,
National Labor Relations Board.

DECEMBER 1941.

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[6] Petitioner's contrary position appears to be based upon its assertion (Pet. 11–12) that only claims grounded on "the private rights of a creditor" may be proved under the Bankruptcy Act. The various governmental liabilities provable, such as the tax claims proved in this case (Pet. 12), leaves petitioner's assertion meritless.

APPENDIX

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 372, 49 Stat. 449, 29 U. S. C. Supp. V, Section 151 et seq.) are as follows:

SECTION 10. * * *

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of

the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

The pertinent portions of the Bankruptcy Act (Act of July 1, 1898, as amended; 11 U. S. C., Supp. V, Secs. 1, 93, 103, and 104) are as follows:

SECTION 1. *Meaning of words and phrases.*—The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * * * *

(11) "Creditor" shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

* * * * *

(14) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

* * * * *

SECTION 57. *Proof and allowance of claims.*—a. A proof of claim shall consist of a statement under oath, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor.

* * * * *

SECTION 63. *Debts which may be proved.*—a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the

filing of the petition by or against him, whether then payable or not, * * * (4) an open account, or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, * * *.

* * * * *

SECTION 64. *Debts which have priority.*— a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, * * * (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, * * *.

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